

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)	
)	
Applications of)	Docket No. 03-15
)	
Independence Public Media of Philadelphia, Inc.)	File No. BFRECT-20050210AKW
and NBC Telemundo License Co. for Digital)	File No. BFRECT-20050210ALF
Channel Elections and Approval of Negotiated)	File No. BFRECT-20050210ARR
Channel Election Agreement)	
To: The Media Bureau		

JOINT REPLY TO OBJECTION OF ABC, INC.

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I. INTRODUCTION AND SUMMARY

In an effort to facilitate the digital transition and preserve, to the extent possible, available over-the-air NBC network service to consumers throughout the Philadelphia market, NBC Telemundo License Co. (“NBC”) entered into a negotiated channel arrangement (the “NCA”) with a noncommercial educational broadcaster in accordance with the Commission’s policies. ABC, Inc. (“ABC”) objected to the NCA by alleging that it adversely affected ABC’s possible future preference for channels involved in the NCA.¹ But the Commission’s rules and policies cannot, and are not intended to, protect every station that might, at some future point in the channel repacking process, have a preference for operating on a particular channel not assigned to it. As a legal matter, the language of the Commission’s NCA policy – which protects stations with channel election *rights*, not stations with possible future preferences – does not cover such

¹ Objection of ABC, Inc. filed March 15, 2005 (“*Objection*”). The NCA provides for Independence Public Media of Philadelphia, Inc. (“Independence”), the licensee of noncommercial educational Station WYBE, Philadelphia, PA, to elect WYBE’s currently assigned NTSC Channel 35 as its digital channel and to release its currently assigned ATSC Channel 34 to NBC’s Station WCAU, Philadelphia, PA, to be elected as that station’s assigned digital channel. This reply is being filed jointly by NBC and Independence in accordance with the procedures established in the public notice released by the Commission on March 1, 2005. See FCC Public Notice, *DTV Channel Election Issues – Proposed Negotiated Channel Election Arrangements and Procedures for Filing Associated Pleadings*, DA 05-519 (Mar. 1, 2005) (“*March 1 Public Notice*”).

future preferences.² As a practical matter, it is impossible for any party to divine whether other stations might have a future interest in the channels addressed by an NCA, which could sweep within the category of affected stations every station in the pertinent market and beyond in an endless daisy chain of claims on potential digital channels. Neither outcome – legal or practical – is what the Commission had in mind when it authorized stations to enter into NCAs. To the contrary, the Commission intended NCAs to be used as an efficient method of resolving channel assignment issues, not as a means of protecting speculative future interests that a station may have in one or more channels.

The NCA between NBC and Independence achieves the Commission’s goal of resolving difficult channel assignment issues through a negotiated agreement. WCAU, an NBC owned and operated station licensed to Philadelphia (the fourth-largest television market), was placed in a very difficult position with respect to its digital channel election. First, the Commission assigned WCAU an out-of-core digital channel (ATSC Channel 67). Subsequently, the Commission, over NBC’s objections, authorized Station WHTM-DT, licensed to nearby Harrisburg, Pennsylvania, to change its digital channel from 57 to WCAU’s analog channel (NTSC Channel 10).³ WHTM thereafter constructed, maximized, and licensed its digital facilities on ATSC Channel 10. The existence of WHTM’s maximized facilities on ATSC Channel 10 in Harrisburg, coupled with the maximized facilities of Station WBPH-DT on ATSC Channel 9 in nearby Bethlehem, Pennsylvania, negated the possibility of WCAU’s return to its analog channel in the post-transition period.⁴ Protecting the Harrisburg and Bethlehem stations

² See *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18298 n.92 (2004) (“*Order*”).

³ See *Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Harrisburg, Pennsylvania)*, Report and Order, 17 FCC Rcd 22673 (MB 2002); see also File No. BLCDT-20040812AAH (WHTM-DT’s covering license application).

⁴ See File No. BFRECT-20050210AEF (Form 382 for WBPH-DT electing ATSC Channel 9).

would require WCAU to operate with such low power on ATSC Channel 10 that millions of established viewers would be denied access to local NBC service.

NBC recognized that it bore the burden of putting to use one of the Commission's preferred resolution processes for addressing WCAU's post-transition circumstances – the NCA. After careful engineering study of the technical possibilities, NBC approached WYBE, one of a very small number of member-supported, independent public television stations in the country not formally affiliated with PBS. Together, the parties negotiated and executed a fair and binding channel arrangement that met the needs and objectives of each party in compliance with the Commission's rules. Each party will receive an in-core digital channel that will provide excellent service to its community of license, and WYBE will receive support from NBC to help the station complete the digital transition.⁵

Contrary to ABC's arguments, the NCA between NBC and Independence complies fully with the Commission's rules and policies, accomplishes the Commission's goal of facilitating the digital transition, and provides appropriate and needed assistance to a noncommercial educational licensee. The Commission therefore should deny the Objection and approve the NCA between NBC and Independence.

II. ABC HAS NO RIGHT TO BE INCLUDED AS A PARTY TO THE NBC/INDEPENDENCE NCA.

ABC claims that because it is not a party to the NCA, the NCA must be rejected. As support for this argument, ABC states that "the Commission will reject an NCA if: (i) the NCA would have an 'effect on the channel election rights' of a station that is not a party to the NCA"⁶ But the NCA has no effect on any channel to which ABC has channel election

⁵ WCAU will receive ATSC Channel 34, and WYBE will operate post-transition on its current analog channel (35).

⁶ *Objection* at 4.

rights. ABC has channel election rights only to Channels 6 and 64, neither of which is materially affected by the channels involved in the NCA.

ABC's claim to the channels at issue in the NCA is entirely speculative; it alleges that it might have chosen to apply for one of these channels at some future point and is therefore adversely affected by the NCA. Accordingly, ABC would like the Commission to construe "adverse impact" within the meaning of the *Order* to include the withdrawal from the pool of available digital channels one or more channels on which a station might have a preference for operating in the post-transition period. This interpretation, however, is at odds with the Commission's own statements, is completely unworkable, and would undermine the very purpose for which the Commission authorized the use of NCAs to develop the final digital Table of Allotments.

To ensure the integrity of its channel allotments, the Commission rightly required parties to an NCA to consider the impact of their channel elections on the channels assigned to other stations. For this reason, the Commission provided that "stations involved in the negotiated channel election arrangement must satisfy our DTV interference rules with regard to their relationship to other stations not involved in the negotiated arrangement."⁷ Thus, parties proposing to enter into an NCA were given two choices: either comply with the DTV interference rules with respect to stations not party to the NCA or negotiate an appropriate interference agreement with such stations as a component of the NCA. But these alternative requirements included only stations with actual present rights to the affected channels and in no way obligated stations subject to an NCA to include as parties stations that might have a speculative future interest in one or more of the channels. Otherwise, no NCA could ever be

⁷ See *Order* at 18298 n.92.

sufficiently inclusive, because it would be impossible for any party to determine what other stations may have a speculative interest in any particular channel.

ABC's self-serving interpretation would require parties to an NCA to have engaged in pure speculation about the possibility that other stations – either in the market or, because of the far-reaching effects of interference and daisy-chain issues, well outside a market – might have an interest in the channels subject to the NCA. ABC's interpretation could require an indeterminable number of stations in adjacent or even more distant markets also to be included as parties to an NCA before any NCA could be acceptable. Even if such a huge, multi-party agreement realistically could be negotiated and finalized (a doubtful proposition), it is inevitable that at least one non-party station – upon reviewing the Forms 382 filed by the parties to the NCA – would decide that it, too, might prefer to operate on one of the channels subject to the NCA and, like ABC, interpose an objection based on some ill-defined future interest.

Far from expediting the resolution of channel assignments, such a reading of “adverse impact” would result in an endless daisy chain of stations, including those stations subject to the NCA and those objecting stations that might have an interest in operating on an affected channel in the post-transition period. This chain could be broken only by an enormously complex, time-consuming, multi-party channel allotment proceeding – precisely the result the Commission sought to avoid with its three-round channel repacking process and its authorization to utilize NCAs to propose final channel assignments. Accordingly, ABC's contention that it should have been included as a party to the NCA must be rejected.

III. THE NCA COMPLIES FULLY WITH THE COMMISSION’S RULES AND POLICIES AND ACCOMPLISHES THE COMMISSION’S GOAL OF FACILITATING THE DIGITAL TRANSITION.

Because ABC cannot prevail on the argument that WCAU is adversely affected by and thus should have been included as a party to the NCA, it resorts to attacking the NCA on the ground that it is “contrary to the public interest.” Each of the arguments ABC offers to support this contention is wrong as a matter of law and policy.

A. The NCA Complies Fully with a Process Expressly Authorized by the Commission and Fosters the Public Interest.

ABC wrongly claims that approval of the NCA would permit Independence and NBC, “through a private agreement protecting only their private interests,” to circumvent the public-interest based procedure established by the Commission for resolving channel election conflicts.⁸ This statement is incorrect on four counts. First, NBC and Independence have not embarked on a rogue undertaking of their own making that cuts the Commission out of the process; the Commission itself devised the NCA as a sensible solution for providing certainty to stations that could not operate post-transition on either of their allotted channels.

Second, the Commission acted entirely within its authority when it enabled NCAs to resolve digital transition issues faced by individual stations. Many Commission rules reflect the Commission’s understanding and concurrence that negotiated agreements between affected parties serve the public interest because such agreements can be the most efficient means of resolving disputes, including with respect to competing claims to broadcast channels. For example:

- The Commission has authorized parties to enter into settlement agreements to remove mutual exclusivity among competing broadcast applications.⁹

⁸ *Objection* at 7.

⁹ 47 C.F.R. § 73.3525. Indeed, the Commission has found such agreements to be so beneficial that it has frequently waived its rule limiting the consideration that can be paid in such circumstances. *See, e.g.*, FCC Public Notice,

- To facilitate the digital transition, parties may enter into interference agreements, which “can include the exchange of money or other consideration from one station to another, including payments to and from noncommercial television stations assigned reserved channels.”¹⁰

Here, the Commission’s strong preference for negotiated resolutions of channel conflicts as a means of keeping the channel repacking process moving is pervasive throughout the *Order*.¹¹

Just like interference agreements, the NCA is the product of a process expressly created and authorized by the Commission for the purpose of facilitating the digital transition.

Third, the benefits offered by the NCA are not limited to those conferred on the parties. As the Commission noted in the *Order*, the channel election process is designed to create an orderly process for assigning channels, move the digital transition along without undue delay, foster spectrum efficiency, and provide the best possible service to the public.¹² The Commission authorized NCAs to be used as part of the digital transition process because they can help to achieve these goals – each of which is fulfilled by this particular NCA. In the present case, Commission approval of the NCA will result in the swift and efficient resolution of a potential channel allotment issue by assigning in-core channels to two stations in the nation’s fourth-largest television market, thereby preserving service to established viewers of each station. The NCA thus serves the goals of utilizing an orderly process for channel assignments,

Settlement Period Announced for Closed Groups of Pending Low Power FM Mutually Exclusive Applications Filed in Window IV, 18 FCC Rcd 19726 (2003) (“To provide settling applicants with maximum flexibility, the Commission will waive Section 73.3525(a) to permit the receipt of consideration in excess of legitimate and prudent expenses”); *accord* FCC Public Notice, *Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applicants*, 16 FCC Rcd 17091 (2001); FCC Public Notice, *ITFS Mutually Exclusive Applications – Settlement Period*, 15 FCC Rcd 5916 (2000).

¹⁰ 47 C.F.R. § 73.623(g). The Commission has expressly authorized such interference agreements to be used to resolve interference conflicts arising from the first round channel elections. *Order* at 18301-02 ¶ 55.

¹¹ *See, e.g., Order* at 18304 nn. 119, 120 (“We do this in an effort to encourage licensees to resolve conflicting channel preferences through settlement negotiations. . . . We believe that in many cases of conflicting second round channel preferences, licensees will be able to reach settlement agreement, thereby avoiding the necessity of having the Commission resolve their conflict after the third round of elections”).

¹² *Id.* at 18291 ¶ 31.

avoiding delay in the digital transition, fostering spectrum efficiency, and providing the best possible service to the public.

Fourth, ABC is wrong that approval of the NCA will circumvent the public-interest based procedure established by the Commission for resolving channel election conflicts. As the *Order* makes clear, the public-interest based procedure cited by ABC comes into play *only* following the third round of channel elections.¹³ Until that point in the process is reached, the Commission has a strong preference for negotiated channel arrangements and settlements, such as NCAs.¹⁴ The rationale for this preference is obvious – the more cases that can be resolved through negotiated settlements, the fewer that must be resolved by the Commission in time-consuming, individual adjudications. Moreover, the procedure invoked by ABC is triggered *only* if stations have made conflicting channel elections. Although ABC attempts to bootstrap its recently expressed preference for one of the two channels subject to the NCA into a *de facto* channel election,¹⁵ this *post hoc* “election” does not comport with the Commission’s established procedures and does not create a channel conflict that must be resolved with reference to the post-third round public interest criteria. Indeed, if the Commission had wanted to resolve every case by analyzing each station against the six specific public interest criteria specified in the *Order*, it would not have established the NCA procedure in the first place.

B. Grantable NCAs Are Not Limited to “Channel Swaps.”

ABC argues incorrectly that the present NCA does not serve the public interest because it does not involve a “channel swap.”¹⁶ According to ABC, an NCA can be approved by the Commission only if Station A agrees to release one of its channels to Station B, and, in

¹³ See *id.* at 18306 ¶ 64 & 18305 n.125.

¹⁴ See *supra* note 11.

¹⁵ See *Objection* at 7 (stating that ABC has indicated its interest in selecting one of Independence’s two in-core channels by filing the *Objection*).

¹⁶ *Id.* at 8.

exchange, Station B releases one of its channels to Station A.¹⁷ This interpretation makes no sense as a technical matter and is not supported by the record. Such a narrow interpretation would so severely restrict the circumstances under which NCAs could be employed as to render them virtually useless.

Moreover, the Commission has never evinced that it intended such a narrow scope for acceptable NCAs. When the Commission authorized parties to enter into negotiated channel arrangements in connection with first round channel elections, it observed that “[c]hannel swapping’ is an existing practice with beneficial results for the marketplace and consumers”¹⁸ The Commission further observed that the negotiated channel arrangements it was authorizing for the digital transition “are *similar in nature* to [channel swaps].”¹⁹ Nowhere in the *Order* or subsequent pronouncements has the Commission suggested that NCAs must involve one-for-one swaps of channels in bilateral arrangements. Moreover, a review of the table of negotiated channel arrangements appended to the *March 1 Public Notice* demonstrates that many other licensees shared the understanding of NBC and Independence that NCAs could involve the election by one station (Party 1) of either its assigned analog or digital channel and the election by another station (Party 2) of the channel not elected by Party 1.²⁰ Similarly, *none* of the NCAs listed on Table 1 attached to the Commission’s March 11 public notice, which identifies NCAs involving stations with two out-of-core channels, would be permissible under ABC’s strained reading.²¹ Yet there is no suggestion whatsoever in the March 11 public notice that these NCAs

¹⁷ *Id.*

¹⁸ *Order* at 18297-98 ¶ 45.

¹⁹ *Id.* (emphasis added).

²⁰ See, e.g., File No. BFRECT-20050210ATZ (KQED elects its existing NTSC Channel 9 as its digital channel, and KRON-TV elects KQED’s assigned digital channel 30 as KRON-TV’s digital channel); see also BFRECT-20050210ABK (Post-Newsweek’s Station WKMG-TV elects NTSC Channel 15 assigned to Daytona Beach Community College’s WCEU as WKMG’s digital channel, and WCEU elects its assigned ATSC Channel 33).

²¹ See FCC Public Notice, *First Round DTV Channel Election Issues – List of In-Core Channels Elected by Out-of-Core Stations Participating in Proposed Negotiated Channel Arrangements; List of Stations That Submitted*

are unacceptable because they do not involve one-for-one channel swaps; nor should there be such a determination – to the contrary, these NCAs have the potential to resolve one of the thorniest issues in the repacking plan – accommodating stations with two out-of-core channel assignments.²² The Commission should reject ABC’s unsupported narrowing of the scope of permissible NCAs.

C. The NCA Will Promote Competition in the Nation’s Fourth-Largest Television Market.

ABC’s final argument contends that the NCA should be rejected because it is a “privately-negotiated acquisition of channel 34” that “could result in anti-competitive effects” between two network owned and operated stations in Philadelphia.²³ This argument is not based on any assertion that NBC has somehow unfairly attempted to *improve* WCAU’s coverage by electing Independence’s assigned digital channel 34. Nor could such an argument be made – Channel 34 works for WCAU because it allows WCAU to achieve its allotted replication facilities.²⁴ As discussed above, the Commission encouraged private parties to negotiate channel arrangements as a means of facilitating the digital transition. Therefore, putting aside ABC’s inappropriate insinuation that the agreement between Independence and NBC is somehow improper because it involves private parties, ABC’s argument is reduced to its essence – it objects to the NCA because it prefers to have Channel 34 assigned to *its* Station WPVI-TV rather than to WCAU.²⁵

Schedule B Reflecting Reduced Operating Facilities in Connection with Proposed Negotiated Channel Arrangements, DA 05-655 (Mar. 11, 2005).

²² One of the agreements listed on the March 11 public notice involves an NCA pursuant to which NBC is releasing an in-core channel to accommodate a station with two out-of-core channel assignments. *See id.*

²³ *Objection* at 9.

²⁴ *See* FCC Form 381, Pre-Election Certification Form filed by WCAU (File No. BCERCT-20041105AVZ).

²⁵ ABC claims that it did not want to participate in a bidding war for Independence’s released channel and insinuates, with no factual support whatsoever, that the process by which Independence and NBC arrived at their NCA was somehow improper. *Objection* at 3. This insinuation is neither relevant nor correct. NBC did not deal with a broker for Independence. The NCA resulted from NBC’s direct contact with Independence. Through

There is no question that both WCAU and WPVI-TV faced difficult challenges in the channel election process. Both stations were assigned out-of-core digital channels. As noted above, WCAU's current analog channel (NTSC 10) cannot be used in Philadelphia following the maximization and licensing of Station WHTM-DT's digital facilities on Channel 10 in Harrisburg and the build-out of Station WBPH-DT's digital facilities on Channel 9 in Bethlehem. NBC recognized that it bore the burden of attempting to resolve this difficult problem and did so using the Commission's preferred mechanism – a negotiated channel arrangement. Under the NCA, each party will receive an in-core digital channel that will provide excellent service to its community of license, and WYBE will receive support from NBC to help the station complete the digital transition. This result is clearly pro-competitive. ABC could have attempted to negotiate a similar agreement with Independence but, for its own reasons, did not. It should not be permitted to disrupt the agreement between NBC and Independence because, in hindsight, it now regrets that decision.

IV. CONCLUSION

The process designed by the Commission for repacking digital television channels involves multiple phases, each of which moves the Commission and television broadcasters closer to a final digital Table of Allotments. As elections are completed in each round of channel elections, including pursuant to negotiated channel arrangements, more channels will be released and made available for election in succeeding rounds, and ABC will have additional opportunities either to choose from among these released channels for WPVI or to enter into its own negotiated channel arrangement. The NCA between Independence and NBC facilitates the

negotiations between the principals and their legal counsel, NBC and Independence reached agreement on the terms of the NCA with full knowledge that the Commission could request a copy of the NCA. These terms provide for NBC to give specified support to Independence to help WYBE complete the digital transition, which is no different from the interference agreements approved by the Commission pursuant to Section 73.623(g) to facilitate the digital transition. There is nothing improper or contrary to the public interest in this arrangement. Quite the opposite, the NCA fulfills the goals set by the Commission when it authorized the use of negotiated channel arrangements and thereby fosters the public interest in facilitating the digital transition.

digital transition by providing in-core digital channels for those parties' stations in Philadelphia, and it does so in full compliance with the Commission's rules and policies. Therefore, the Commission should deny ABC's *Objection* and approve the NCA.

Respectfully submitted,

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March 22, 2005

CERTIFICATE OF SERVICE

I, Theresa L. Rollins, do hereby certify that a copy of the foregoing “Joint Reply to Objection of ABC, Inc.” was served by express U.S. mail, postage prepaid, except as otherwise noted, on this 22nd day of March, 2005, on the following:

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